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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

OTIS DOBINE et al., Plaintiffs and Appellants, v. CITY OF LOS ANGELES, Defendant and Respondent.	B200791 (Los Angeles County Super. Ct. No. BC349494)

APPEAL from a judgment of the Superior Court of Los Angeles County. Haley J. Fromholz, Judge. Affirmed.

Law Offices of Gregory W. Smith and Gregory W. Smith for Plaintiffs and Appellants.

Rockard Delgadillo, City Attorney, Angel Manzano, Assistant City Attorney, and Richard Loomis, Deputy City Attorney for Defendant and Respondent.

Otis Dobine (Dobine), Dan Garcia (Garcia), Belinda Gomez (Gomez), Yvonne Parker (Parker), and Rudy De La Fuente (De La Fuente) (collectively "appellants") appeal from a judgment in favor of the City of Los Angeles (respondent) entered after the trial court granted respondent's motion for summary judgment on appellants' claims of race and/or disability discrimination in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). We affirm.

CONTENTIONS

Appellants contend that the trial court erred in granting summary judgment on appellants' claims of race and/or disability discrimination. Specifically, appellants claim that the trial court erred in determining that appellants failed to set forth sufficient evidence to create a triable issue of material fact as to: (1) whether appellants were subject to adverse employment actions; and (2) whether appellants were discriminated against due to their membership in a protected class.

FACTUAL BACKGROUND

In 2001, respondent entered into a federal consent decree as a result of the notorious Rampart scandal. The consent decree mandated an adjustment in the way that the Los Angeles Police Department (Department) investigated any significant use of force against a civilian. Then Police Chief Bernard Parks formed a new unit to respond to and investigate officer involved shootings. It was known as the Critical Incident Investigation Division (CIID). Dobine was one of the individuals originally selected to staff CIID. According to appellants, "CIID was staffed and essentially created by" Dobine. The other appellants were also police officers assigned to CIID.

As required by the consent decree, the Department's handling of officer involved shootings was subject to an independent monitor, which issued quarterly reports evaluating CIID's operations. The independent monitor's report for the quarter ending September 30, 2003, included scathing criticisms of CIID's use of force investigations, and deemed CIID to be out of compliance with the consent decree. Appellants presented evidence that CIID's problems arose due to a bifurcation of the investigations of officer

involved shootings between CIID and the Robbery Homicide Division (RHD). Appellants explain that upon the creation of CIID, RHD was relegated to investigating and interviewing citizens involved in police use of force incidents. RHD exhibited reluctance to provide its work product in a timely manner and began to "hide the ball." The reports were often late and the RHD's sloppy work reflected unfairly on CIID.

Upon learning of the negative report from the independent monitor, Gerald Chaleff, head of the Department's Consent Decree Bureau, reviewed numerous reports of officer involved shootings investigated by CIID. He determined that the independent monitor's negative evaluation was appropriate. Chaleff conferred with Chief William Bratton about the negative critique of CIID, and Bratton authorized a reorganization of CIID to create a new unit, Force Investigation Division (FID). Chaleff and Bratton agreed that reorganization, including new leadership, was necessary to ensure that FID met the standards of the consent decree.

Captain James Voge was selected as the commanding officer of FID. As the officer in charge of "leading the transition from CIID to FID," Voge's duties included "making significant personnel changes." Appellants maintain that they were refused transfer into the newly created FID either because of their race or because of their perceived disabilities.

In making selections for the lieutenant positions in FID, Voge interviewed numerous lieutenants. Of the three lieutenants staffed at CIID, Dobine was the only one who interviewed for a position at FID. While Voge recognized and appreciated Dobine's experience, he chose three lieutenants he believed were better qualified for the position. Voge testified that his decision not to select Dobine was not based on Dobine's race, but on his belief that the lieutenants he selected would effectively implement the revised policies, procedures, methods and approaches formulated for FID.

Prior to selecting his lieutenants, Voge selected some detectives from CIID and other divisions as part of FID's initial staffing. After Voge selected his lieutenants, a pay grade advancement and transfer opportunity notice for the remaining FID detective

positions was circulated throughout the Department. The FID lieutenants interviewed applicants and selected the remaining detective members of FID, subject to approval of Voge.

Parker interviewed and was offered a detective position with FID. She turned it down. Garcia was also selected for a detective position at FID. However, Garcia did not sign the document indicating he had been selected for this position, which suggested to Voge that "he declined this assignment or . . . he was not fully cognizant that he had been selected for assignment to FID."

Gomez did not interview for a detective position with FID. Voge did not select Gomez on his initial staffing list because, at the time that Voge made his initial decisions, Gomez was being investigated for worker's compensation benefits abuse. De La Fuente also did not interview for a detective position with FID. Voge did not select De La Fuente on his initial staffing list because he felt that the other detectives he selected were stronger candidates.

At the time that Voge made his initial selections, a list was prepared of 13 CIID officers who were not initially selected to move to FID. The five appellants were on that list. Voge reviewed the list and noted that there were three African-Americans on the list: Dobine, Parker, and Lefall. Of those three, Voge noted, Parker was ultimately selected for FID, and Lefall retired.

Deputy Chief James McMurray, who was a commander of CIID, was informed that his supervisor, Assistant Chief George Gascon, wanted McMurray to meet with the individuals from CIID who were not going to be moved to FID. On the following day McMurray had a meeting with Dobine, Arreola, Parker, Gomez, and Garcia, and informed them that they would not be moved to FID.[1] McMurray was not informed as to why these officers were deselected.

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[1] McMurray could not reach De La Fuente, therefore McMurray was unable to meet with De La Fuente on that day.

McMurray later spoke with Commander Mike Perez, the Employee Relations Group commander. McMurray told Perez that he was concerned that Dobine, Arreola, De La Fuente, Gomez, Garcia and Parker were being deselected because of their race and/or their disability status. On May 17, 2004, McMurray prepared a memorandum regarding these concerns directed to Chief Gascon. McMurray stated that Gascon never responded to the memorandum.

PROCEDURAL HISTORY

Appellants filed their complaint against respondent on March 23, 2006, alleging race and disability discrimination in violation of FEHA. Specifically, appellants alleged that they were not selected for transfer to FID because of their race and/or disabilities.[2] On February 13, 2007, respondent filed its motion for summary judgment or, in the alternative, motion for summary adjudication (summary judgment motion). A hearing was held on May 29, 2007, and, on the same date, the trial court entered an order granting the motion.

In a written ruling, the court found that each appellant could not make a prima facie showing of discrimination. As to Parker, the court explained, she did not suffer an adverse employment action because she was offered a position in FID and turned it down. As to Dobine, the court held that McMurray's declaration was insufficient to create a triable issue of material fact regarding racial discrimination because McMurray's statements regarding alleged discrimination amounted to no more than speculation. As to Gomez, Garcia, and De La Fuente, the trial court found that they produced no evidence that Voge's legitimate, nondiscriminatory reasons for failing to select them for transfer to FID were pretextual. The court sustained respondent's evidentiary objections to the

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[2] The six original plaintiffs were Otis Dobine, Dan Garcia, Belinda Gomez, Yvonne Parker, Joseph Arreola and Rudy De La Fuente. At the time of the filing of the motion for summary judgment underlying this appeal, Arreola had dismissed his claims in their entirety and Garcia, Gomez and De La Fuente had dismissed their claims of race discrimination, leaving them only with claims of disability discrimination.

declarations of Dobine and McMurray. The court overruled appellants' evidentiary objections.[3]

On July 13, 2007, the court entered judgment in favor of respondent and ordered appellants to pay respondent's costs. On July 19, 2007, appellants filed their notice of appeal.

DISCUSSION

I. Standard of Review

The standard of review for an order granting or denying a motion for summary judgment or adjudication is de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*).) The trial court's stated reasons for granting summary relief are not binding on the reviewing court, which reviews the trial court's ruling, not its rationale. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.)

A party moving for summary judgment "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar, supra*, 25 Cal.4th at p. 850, fn. omitted.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*, fn. omitted.) "A defendant bears the burden of persuasion that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto. [Citation]." (*Ibid.*)

Generally, "the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie

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3 Appellants have not challenged the trial court's evidentiary rulings and have accordingly waived the issue on appeal. (*Dina v. People ex rel. Dept. of Transportation* (2007) 151 Cal.App.4th 1029, 1048.)

showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]" (*Aguilar, supra*, 25 Cal.4th at pp. 850-851.)

II. Standards Applicable to FEHA Claims

FEHA prohibits discriminatory employment practices. It is an unlawful employment practice for an employer, "because of the race . . . [or] physical disability . . . of any person . . . to discriminate against the person in compensation or in terms, conditions, or privileges of employment." (Gov. Code, § 12940, subd. (a).)

The framework for determining the existence of a cause of action for race or disability discrimination is as follows: "Under well-settled rules of order of proof, the employee must first demonstrate a prima facie showing of prohibited discrimination. If the employee does so, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its action. The employee then has the burden of proving the proffered justification was a pretext for discrimination. [Citations.]" (*Nelson v. United Techs* (1999) 74 Cal.App.4th 597, 613, citing *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802.)

The elements of a prima facie case of racial or disability discrimination may vary depending on the particular facts. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.) "Generally, the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive. [Citations]." (*Ibid.*)

Bearing these standards in mind, we review each cause of action before us and the evidence presented by the parties.

III. Dobine and Parker -- Claims of Racial Discrimination

We first analyze the racial discrimination claims of Dobine and Parker, both of whom are African-American.

A. Protected Class

Respondent does not dispute that Dobine and Parker are members of a protected class.

B. Qualification/Competence

Parker

Parker's competence was not a significant issue on summary judgment. Appellants presented no admissible evidence of Parker's qualifications.[4] However, respondent's indication that Parker was in fact offered a position in FID suggests that respondent agreed that she was competent and qualified.

Dobine

Dobine presented evidence that he was qualified for a position in FID. Dobine points to Voge's deposition testimony, in which Voge acknowledged that Dobine had extensive experience investigating officer involved shootings. Voge also acknowledged that Dobine was qualified to work as a lieutenant in FID, although Voge felt that the lieutenants he picked were better candidates.

Both Parker and Dobine have presented evidence to establish that they were qualified for positions in FID.

C. Adverse Employment Action

In analyzing whether Parker and Dobine suffered adverse employment actions, The ultimate question is whether appellants presented substantial evidence that they were "subjected to an adverse employment action that materially affect[ed] the terms, conditions, or privileges of [their] employment." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1051 (*Yanowitz*).) If the employment action was "reasonably likely to

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[4] The trial court sustained respondent's objection to a statement in McMurray's declaration indicating that "Lieutenants Dobine and Arreola and Detectives De La Fuente, Parker, Gomez, and Garcia were all qualified and should have been transferred into their respective positions in FID."

impair a reasonable employee's job performance or prospects for advancement or promotion," then it is actionable. (*Id.* at pp. 1054-1055.)

Both Parker and Dobine claim that the adverse employment action that they suffered was Voge's failure to transfer them from CIID to FID.

Parker

Although Parker was not selected as part of the team that Voge initially put together for FID, she was later offered a detective position at FID, which she turned down. Nevertheless, appellants claim that "the damage had already been done when she was deselected on the original list. To permit a dismissal on Parker's claim because she was later offered a position would permit [respondent] to avoid the consequences of [its] actions and undermine the importance of FEHA protections."

Appellants offer no legal support for their position that, despite being offered a position at FID, Parker can maintain a claim of discrimination for respondent's failure to offer her the position at an earlier time. Parker claims no damage or material effect on her career resulting from the lapse in time between the date that Voge made his initial staffing decisions and the date that Parker was offered a detective position at FID.[5] We find that the undisputed fact that Parker was offered a position at FID negates any claim that respondent's failure to offer her such a position constituted an adverse employment

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[5] *Burlington Northern & Santa Fe Ry. v. White* (2006) 548 U.S. 53 is distinguishable. Despite the fact that the employee in *Burlington* was reinstated with back pay after her unlawful suspension, the Supreme Court found that she had suffered damages during that month without pay. "White described her physical and emotional hardship to the jury, noting that she obtained medical treatment for emotional distress." Thus, the high court concluded, "the jury's conclusion that the suspension was materially adverse was reasonable." (*Id.* at p. 55.) There is no evidence that Parker suffered any such damages between the time that Voge made his initial staffing picks and the time that she was offered a position at FID.

action. Parker cannot create a triable issue of material fact as to this element of her discrimination claims, therefore they must fail.[6]

Dobine

Dobine claims that Voge's failure to select him as a lieutenant in FID constituted an adverse employment action because (1) he lost the use of a city vehicle; (2) he lost pay for overtime; and (3) he lost the ability to be promoted because he was "administratively transferred" from CIID. We address each argument separately below.

Appellants' claims that they lost use of a city vehicle are not supported by citation to relevant evidence. In support of their statement that they lost use of a city vehicle, appellants cite Dobine's declaration. That declaration makes no mention of the loss of use of a city vehicle. In addition, Dobine's deposition testimony reveals that in the two positions he has held since CIID was disbanded, he has had the use of a take-home car. Specifically, Dobine testified that he went from CIID to the commercial crimes department, where he oversaw the burglary special unit section. Dobine initially testified that he was not given a take-home car in the commercial crimes department, but he later clarified that he was given a take-home car in that position in January 2005 as part of a task force to address a string of burglaries in Bel-Air. He kept the car until that task force ended, about five months later. Dobine remained with the commercial crimes department for a total of one year and two months before moving to his current position in the juvenile department, where he does have a take-home car. Thus, Dobine's attorney clarified that Dobine's claim was for "the period that he didn't have a car." We find that Dobine's temporary loss of use of a city vehicle, for a period of less than one year, did not "materially [affect] the terms, conditions, or privileges of [his] employment." (*Yanowitz, supra*, 36 Cal.4th at p. 1051.)

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6 Parker's failure to create a triable issue of fact as to whether she was subject to an adverse employment action defeats both her racial discrimination claim and her disability discrimination claim.

In addition, appellant provided no admissible evidence that he lost overtime pay when he was transferred from CIID.[7] Because there is no admissible evidence of a loss of overtime pay, we do not consider this factor to support Dobine's claim that he suffered an adverse employment event.

Appellants allege that an administrative transfer is a "mark against any officer that receives one. They are considered problems and their ability to promote is adversely [a]ffected." Appellants provide no citation to the record in support of this statement. In their separate statement filed in opposition to respondent's summary judgment motion, appellants did not dispute that "[Appellants], who were not selected to join FID were given their choice of reassignment to any other unit, subject to availability of openings." Appellants responded: "Undisputed. However, this was subject to an administrative transfer." Appellants' separate statement provides no citation to evidence in support of this claim. Our review of the record reveals no evidence that Dobine was subjected to an administrative transfer or that, even if he was, an administrative transfer is truly detrimental to an officer's career.[8]

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[7] Dobine stated in his declaration: "All of the detectives and I, received a decrease in pay when we went off to other units because we no longer received the extensive amount of overtime that we received while working in CIID. Had we been moved to FID, the overtime would have continued at approximately the same rate as we received in CIID." Respondent's objections to this statement on the grounds of hearsay, lack of personal knowledge, lack of foundation and speculation were sustained by the trial court. Therefore this statement is inadmissible and we do not consider it. (Code Civ. Proc., § 437c, subd. (c) [the court "shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court"].)

[8] Dobine stated in his declaration: "I can categorically state that an administrative transfer impairs the prospects for advancement or promotion within the department. Consequently, all of the plaintiffs in this case, including myself, will not promote or advance to a higher rank in the foreseeable future. [¶] [T]here was widespread rumors in the department that we were all subjected to an administrative transfer." Respondent's objections to these statements on the basis of hearsay, lack of personal knowledge, lack of foundation, and speculation pursuant to Evidence Code section 702, subdivision (a)

Appellants correctly state that a series of separate acts collectively may constitute an adverse employment action although none of the acts individually is actionable. (*Yanowitz, supra*, 36 Cal.4th at pp. 1055-1056.) However, under the circumstances, we find that this series of nonactionable events does not constitute an adverse employment action. Dobine's loss of a city vehicle was only temporary. There is no evidence that he lost overtime pay, and there is no evidence that he was subjected to an administrative transfer. Dobine has failed to create a triable issue of material fact as to whether he suffered an adverse employment action.[9]

D. Discriminatory Motive

Because we have determined that Parker and Dobine failed to present evidence creating a triable issue of material fact as to whether they suffered an adverse employment action, we need not discuss this element of their discrimination claims. However, as set forth below, even if they had presented evidence of an adverse

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were sustained by the trial court, therefore we do not consider them. (Code Civ. Proc., § 437c, subd. (c).) In their separate statement of undisputed facts, appellants cite Voge's deposition at page 70 for the proposition that "[i]t is common knowledge in the department, although there is nothing in writing, that a police officer that is administratively transferred is a problem." This page of Voge's deposition has not been made available to this court in the record. In addition, even if this evidence were in the record, appellants' position that appellants were "subject to an administrative transfer" is not supported by any citation to evidence.

9 Appellants cite three cases for the proposition that an adverse employment action may properly be found even when an employee is transferred to a position of the same pay and status. (*St. John v. Employment Development Dept.* (9th Cir. 1981) 642 F.2d 273; *Collins v. State of Illinois* (7th Cir. Ill. 1987) 830 F.2d 692; *Hinson v. Clinch County Bd. of Educ.* (11th Cir. Ga. 2000) 231 F.3d 821.) These three federal cases, which discuss the standard applicable to Title VII cases, are not binding on this court. (*Alameida v. State Personnel Bd.* (2004) 120 Cal.App.4th 46, 61.) Nor are they persuasive under the circumstances of this case. In *St. John* and *Collins*, the transfers at issue occurred after the plaintiffs filed grievances alleging discrimination, and were therefore retaliatory. (*St. John*, at p. 274; *Collins*, at pp. 696-697.) And in *Hinson*, the plaintiff suffered a reduction in pay and prestige. (*Hinson*, at pp. 829-830.) These factual circumstances are not comparable to those before us.

employment action, we would find that they failed to create a triable issue of material fact as to discriminatory motive.

In support of their claim that a discriminatory motive existed, appellants rely heavily on McMurray's declaration. Appellants quote extensively from the declaration – including significant portions which were determined by the trial court to be inadmissible. For example, appellants quote McMurray's statement that "[i]t was very strange and unusual personnel practice that I was not consulted or told why these individuals had been deselected considering the fact that all of the individuals worked under my command." Appellants ignore the fact that the trial court sustained respondent's objection to this statement on the grounds of hearsay, lack of personal knowledge and lack of foundation. The trial court also sustained respondent's objections to McMurray's statements that "the new lieutenants and detectives that were originally selected to staff FID were picked before any type of interview process occurred" and his "belief that the deselection process was based on race and/or disability of the former CIID members."

McMurray's memorandum to Chief Gascon dated May 17, 2004, raises nothing more than mere speculation as to any possible discriminatory motives. Further, McMurray focused more on disability discrimination, conceding that "the racial bias matters are not as blatant." McMurray raised no concrete evidence of racial bias, but merely noted that the "risk management aspects of this pending personnel movement need to be explored thoroughly with the City Attorney before proceeding."

We find that Dobine and Parker have failed to create a triable issue of material fact as to whether Voge's decision not to initially select them for FID resulted from a discriminatory motive.

IV. Gomez, Garcia, and De La Fuente -- Claims of Disability Discrimination

We next analyze the claims of disability discrimination alleged by Gomez, Garcia, and De La Fuente. With respect to a claim of disability discrimination, the FEHA test may be stated slightly differently. The plaintiff must show that (1) he suffers from a

disability; (2) he is otherwise qualified to do his job; and (3) he was subjected to an adverse employment action because of his disability. (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 254.)

In its motion for summary judgment, respondent did not specifically put at issue the first two elements of these appellants' disability discrimination claims. Therefore, we focus on the third element – adverse employment action.

We find that appellants failed to create a triable issue of material fact as to whether their failure to be selected to transfer to FID constituted an adverse employment action. The evidence showed that Garcia, like Parker, was later offered a position at FID. In addition, respondent presented evidence that none of the appellants suffered a demotion or a decrease in pay. In fact, "[t]he CIID members who were re-assigned were given an opportunity to select other assignments within the LAPD with the understanding that the Department would attempt to accommodate their requests. In fact, all were placed in specialized detective units."

There is no evidence that the appellants at issue suffered a material change in the terms of their employment or an employment injury as a result of their transfer to different detective units. There was no admissible evidence that these appellants lost overtime pay or the use of a take home vehicle. In addition, as discussed above with respect to Dobine's racial discrimination claims, there was no evidence that appellants were subject to an administrative transfer. "A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient." (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1454-1455.) Because there was no evidence of an adverse employment action suffered by any of these appellants, they failed to meet this element of their claims.[10]

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[10] Respondent also produced evidence that Voge was unaware of any disabilities suffered by the appellants at the time that he made the employment decisions. Because we have determined that appellants have not produced evidence that they were subject to an adverse employment action, we need not address this issue.

Because appellants have failed to present evidence showing an adverse employment action, their claims of disability discrimination fail as a matter of law.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST